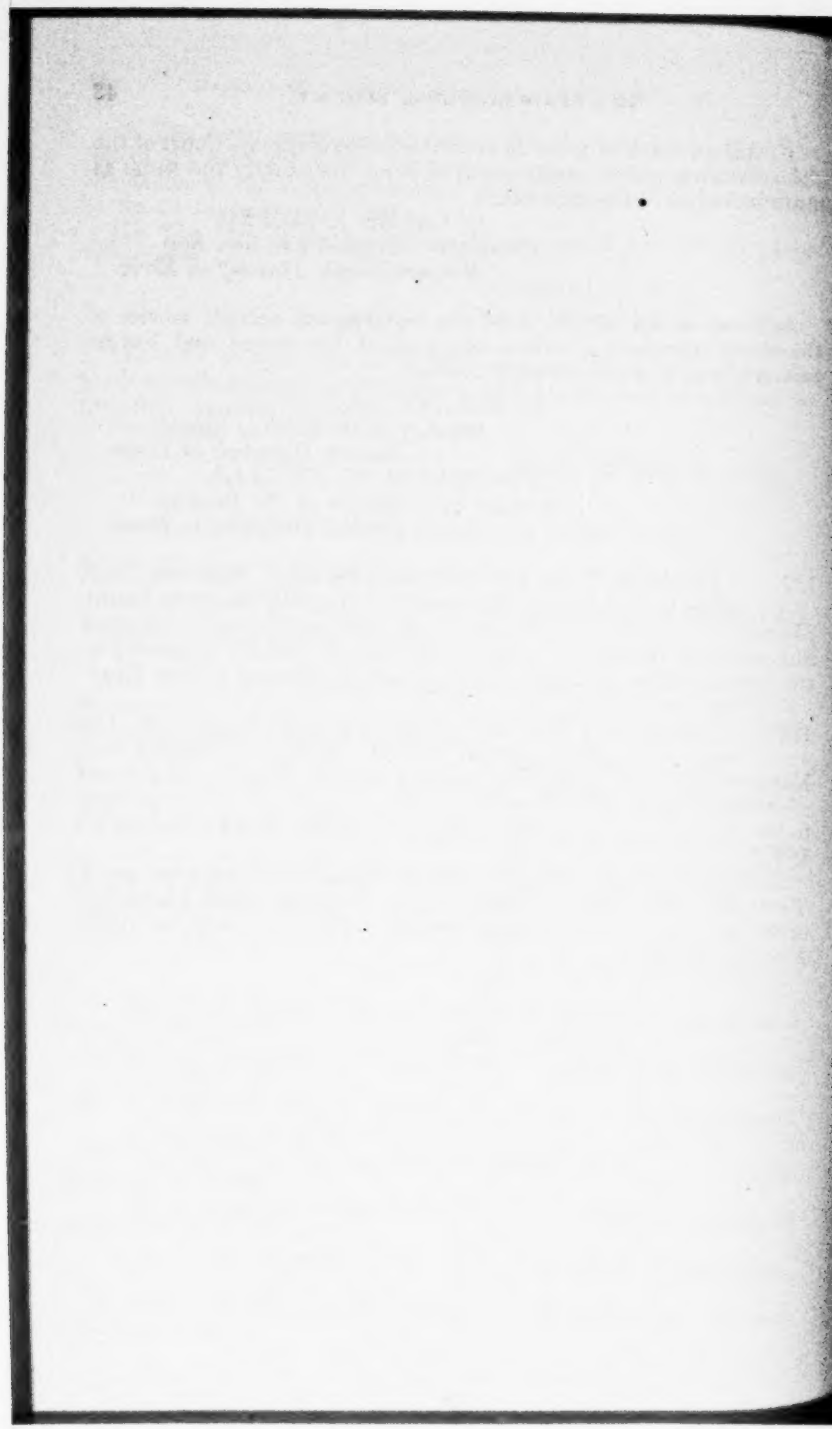

IN THE

SUPREME COURT OF THE UNITED STATES.

MARGARET CUNNIUS, NOW MARGARET SMITH,
PLAINTIFF IN ERROR,

v.

THE READING SCHOOL DISTRICT,
DEFENDANT IN ERROR.

REPLY TO BRIEF OF DEFENDANT IN ERROR.

Counsel for appellee have altogether misconceived the question involved in this case. To decide abstractly whether a State can by a statute clothe its Courts with certain powers would not be to the point, because the same act of Assembly may be valid as to some persons and the reverse as to others: *Rothermel v. Myerle, 136 Pa. 250, 266; Presser v. Illinois, 116 U. S. 252.* The persons as to whom an act is constitutional may not be before the Court. Granting that the State through an act of Assembly has clothed a Court with certain powers, the real point at issue is the effect of the operation of those powers on the rights of the party before the Court. In the case of *Pennoyer v. Neff*, the Oregon act had clothed its Court with jurisdiction to bring an action against a non-resident, who had property in the State and had ordained substituted service by publication. Yet the judgment recovered in accordance with said act was declared to be invalid and of no binding effect on Neff, because rendered in violation of fundamental and well-known principles of law, and in contravention of the 14th Amendment. Whatever other effect the act of 1885 may have, we have throughout

our argument confined ourselves to its operation on the private rights of Margaret Cunnius, for her case only is before the Court. Hypothetically as counsel for appellee state the question involved, that statement does not agree with the terms of the act nor the facts of the case. The act of 1885 does not clothe the Court with power to administer upon the estate of a living person, for as soon as it appears that the person is not dead, the act acknowledges the invalidity of the proceeding as to such person. Nor under our view of the case, did the non-resident have any property in the State which could be subjected to the powers of this act.

We repeat and reassert that the legal situs of plaintiff's property, that is the right to the arrearages of interest owing her by the School District, as well as the situs of the arrearages themselves for which the defendant was indebted, was in California at the time of the proceedings: *New Orleans v. Stempel, 175 U. S. 310, 313, 314; Tax on Bonds, 15 Wallace 300, 320.* We are suing for the arrearages of interest alone, and not for the dower right, as appellee seems to contend, for this dower right was fixed in 1882 by virtue of the partition proceedings referred to on page 1 of our paper-book. An action of assumpsit would not lie to recover a dower. These arrearages of interest, no one will dispute, are personal property, and the act of March 29, 1832, *P. L. 22* (see *Hillbish's Appeal, 89 Pa. 490, 496*), by virtue of which the dower principal was fixed, gives the plaintiff the same remedies for the recovery of the arrearages of interest as the law affords for the collection of rents, that is, by action of debt, assumpsit, or distress: *113 Pa. 309.* This right of the plaintiff to the annual arrearages of interest, whether enforceable by action of debt, assumpsit, or distress, had no locality independent of her domicil, which was California. And no legislative act exists to change the situs of said right to the arrearages in question, nor the arrearages themselves owing her by the School District, so far as the plaintiff is concerned, she having been a non-resident creditor at the time: *175 U. S. 313, 314; 15 Wallace 300, 320.*

The Supreme Court of Pennsylvania says that it is not in the interests of order and good government that property lie ownerless: but there was no tangible personal property belonging to plaintiff lying ownerless in Pennsylvania, the School District not having set apart a fund in concrete form, designating it as the yearly arrearages belonging to the plaintiff.

True it is, as stated by counsel for appellee, that a debt owing to a non-resident by a resident debtor may be attached by a resident creditor. Such attachment laws, in justice to creditors, exist in every State; but such laws do not change the situs of the debt nor the right thereto in this case, so far as Margaret Cunnius is concerned (*15 Wallace 320*); but if a resident creditor having the strongest claim against a non-resident, can only, through a proceeding *in rem* by attachment, reach the property, should not the same requirements be exacted from a person having no right at all to the property of a non-resident who proceeds to deprive such non-resident owner of his title, without even going through the semblance of a seizure of the property, until after the grant of letters of administration in pursuance of a decree of a Court to which the non-resident owner was neither party nor privy and of which he had no lawful notice?

Nor is the case of *Arndt v. Griggs, 134 U. S. 316*, analagous to the case in hand. That was a proceeding to remove a cloud from the title to real estate. Such proceedings are common in equity courts. The complainant, however, in such a case before he can invoke this relief must have a clear legal title and be in possession, and the pretended title or right which is alleged to be a cloud must be clearly invalid and inequitable. For where the complainant has no title or a doubtful title, he cannot have this relief: *Phelps v. Harris, 101 U. S. 374, 375*. Conflicting titles to real estate cannot be tried in a court of equity. The proper forum to try titles is a court of law, and in such Courts the rule as to personal service on the defendant prevails: *Frost v. Spitley, 121 U. S. 552, 557*. Applying this law to the case in hand, we contend that the plaintiff's title to her property in

question could not be divested and passed over to another for distribution, or for any other private purpose, in this proceeding, except by first serving personal notice on the plaintiff. It will not do to say that notice by publication was the only notice available. A similar notice was the only feasible one in *Pennoyer v. Neff*, yet notwithstanding such notice the judgment rendered in accordance with it was invalid and of no binding effect on the defendant. Even the notice given in this case to the supposed decedent by publication was insufficient, as said notice did not state the purpose of it, nor the result of a default. (Printed record, p. 20.)

Of course where a foreign decedent leaves property in the State, even if only a debt due to him, such property is the subject of local administration. This proceeds on the ground that a foreign administrator has no authority to sue in the local Courts, and also because resident creditors are entitled to be paid out of the fund. The distribution of the balance, however, is governed by the law of the decedent's domicil: *Barry's App., 88 Pa. 131.* But before this law can be invoked there needs must be an actual decedent. The property of a living non-resident cannot, by virtue of a mere act of Assembly, be transferred to the local Courts for the purposes of administration.

Divorce proceedings are not analogous, as counsel for appellee contends. They say that a divoree proceeding is *in rem*, and yet no previous seizure of property is required. A proceeding in divorce is not a proceeding against property at all, the *res* being the status of the person whether married or not. Partition proceedings are not akin, for in such proceedings different owners deriving title from a decedent seek to have their respective portions allotted to them. There can be no partition of personal property, especially where there is but one owner from whom the title has not passed.

Nor is the proceeding under the act of 1885 of such a character as to constitute it a proceeding against property, thereby making it a proceeding *in rem*, for the property is not proceeded against nor taken possession of until after the appointment of

the administrator in pursuance of a proceeding and a decree of a Court of which the lawful owner of the property had no notice and to which he was neither party nor privy: see *Leigh v. Green, 193 U. S. 79, 91.* Merely giving a name to an action as concerning the thing rather than the personal rights in it cannot justify the proceeding, if in fact the property owner is deprived of his rights without due process of law: *Leigh v. Green, 193 U. S. 79, 90.* An administrator's rights only attach after authority is conferred upon him through the Register's grant of letters: *Leber v. Kauffelt, 5 W. & S. Pa. 440, 445.* As said by the Superior Court in this case, an administrator might with all regularity be appointed under this act where the person had no property in the State (just what happened in this case), for the only requirements essential to the entry of the decree in the Orphans' Court are: 1. That the applicant would be entitled to letters in case of the actual death of the supposed decedent; and 2. That the evidence makes out the presumption of death. It need not be represented to the Court that the supposed decedent has any property at all at the time. Administration might be taken out for some other purpose, as mentioned by the Superior Court.

As a proof that the property of Margaret Cunnius was not in the custody of the Court at the commencement of the proceedings under the act of 1885, we would argue that had she assigned her right to her arrearages between the time application was made for administration and the grant of letters to John S. Gallagher, a valid title to said arrearages would have passed to her assignee, unaffected by the proceedings under the act of 1885.

Nor does it help the case of the appellee to say that the Orphans' Court had jurisdiction of the subject-matter, because this, in itself, is insufficient in the absence of jurisdiction over the person and property of Margaret Cunnius: *Stevenson v. Christie, 42 S. W. 418, 419.* Neither are the equities raised by the appellee material or controlling. Such equities were raised in similar cases and dismissed as unimportant: *Scott v. McNeal,*

154 U. S. 34; Levin v. Bank, 1 Fed. 641, 671. More than that, the defendant did not plead an estoppel *in pais*, but an estoppel by record—a decree and appointment alleged to be binding on the record. As to the contention concerning two innocent parties raised by appellee, see *Lavin v. Bank, supra, 670, 671.* There are some misfortunes that even the most innocent cannot be protected against by the power of the State. Such is the case of persons who are innocently misled into the belief that void judgments are valid: *Lavin v. Bank, supra, 671.*

Nor is it necessary to invoke the act of 1885 in order to put wife and children into possession of the property of an absent father, so that the family may not suffer for want of support. An act exists in Pennsylvania for such purpose: *122 Pa. 272.* In addition, no such case is before the Court.

Nor did the act operate beneficially on the rights of Margaret Cunnius, for the sum of $129.78 was expended and allowed as costs of administration, as appears from a reference to the account filed by the administrator to No. 91 January Term, 1897, in evidence in this case. Under the act these costs are payable out of the estate, and no security for their return is exacted. The administrator who gave security at the instance of the defendant, a matter referred to in our paper-book, page 22, gave security only for the return of the balance after extracting this $129.78 from the estate. If the plaintiff be driven to the revocation of the letters before she can recover the remains of her own estate, another hundred dollars or more will have to be expended as costs of revocation, and these also are payable out of the estate. This would leave the plaintiff about one-third of the estate left to her. Certainly under such a state of facts, the act of 1885 was anything but beneficial in its operation on the private rights of Margaret Cunnius.

Accepting for the sake of argument the interpretation put upon the act of 1885 by the Supreme Court of Pennsylvania, to the effect that its purpose is conservation of an estate, the act did not apply to the facts of this case. There was no

tangible personal property in Pennsylvania belonging to the plaintiff which required the offices of a conservator. The financial responsibility of the Reading School District, a wealthy and perpetual corporation, was a far better conservator of the right to the arrearages of interest than this act could afford. For had she returned, as in fact she did, during the statutory period, every cent of her money would, on a mere demand, have been paid to her. As it is, $129.78 of her property is beyond recovery, in case the opinion of the Supreme Court of Pennsylvania should stand, with the probability of the expenditure of another hundred dollars or more, in an effort to recover the remains of her own property.

We are told by the Supreme Court of Pennsylvania that it is not in the interests of order and good government that property lie ownerless, thereby intimating that the act of 1885 comes within the police power of the State. We fail to perceive how the interests of order and good government are concerned, affected, or involved in the case of a person entitled to an accumulating yearly debt, collectible at any time on demand during twenty-one years, where such person in the exercise of one of the privileges of her liberty, also secured by the Fourteenth Amendment, the privilege of changing her domicil from one State to another, leaves the Commonwealth, and during the life of her right makes demand for her yearly arrearages. The School District knew when the plaintiff went away she could recover at any time during twenty-one years. It was not concerned about the absence of the plaintiff, well knowing that the longer she remained away, the nearer came the bar of the Statute of Limitations. Nor is the taxing power of the State asking satisfaction out of the property of Margaret Cunnius, and under the authority of *15 Wallace 300*, that power could not reach said property. Neither is a creditor seeking to enforce a valid claim. Such creditor's rights are secured by attachment proceedings.

The School District could have protected itself by demanding absolute security from the administrator before paying over the money to him, and under the equity powers of the Orphans' Court such security would no doubt have been required of the administrator. The framers of the act could also have prescribed such security; but in no event could the proceedings under the act have bound Margaret Cunnius, for she was neither party nor privy to such proceedings, and had no lawful notice.

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